IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 16, 2006 Session

TREVOR HUBERT ET AL. v. TURNBERRY HOMES, LLC

Appeal from the Chancery Court for Williamson County
No. 31142 Russ Heldman, Judge

No. M2005-00955-COA-R3-CV - Filed on October 4, 2006

This appeal involves the enforceability of an arbitration clause in a residential construction contract. After the construction was completed, the purchasers filed suit against the builder in the Chancery Court for Williamson County alleging numerous construction defects and code violations. The builder moved to compel arbitration pursuant to the contract's arbitration clause. When the purchasers argued that the arbitration clause was invalid because they had not separately signed or initialed it as required by the Tennessee Uniform Arbitration Act, the builder asserted that the Federal Arbitration Act, rather than the Tennessee Uniform Arbitration Act, governed the parties' agreement to arbitrate. The trial court denied the builder's motion to compel arbitration without explanation, and the builder appealed. We have determined that the Federal Arbitration Act preempts the Tennessee Uniform Arbitration Act except insofar as the purchasers' fraudulent inducement claim is concerned.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Todd E. Panther, Nashville, Tennessee, for the appellant, Turnberry Homes, LLC.

Corey J. Stringer, Nashville, Tennessee, for the appellees, Trevor Hubert and Violet Hubert.

OPINION

I.

On February 1, 2003, Trevor and Violet Hubert contracted with Turnberry Homes, LLC ("Turnberry") to construct a new house in a subdivision straddling the boundary line between the City of Brentwood and the City of Franklin in Williamson County. The Huberts were dissatisfied with the house when it was completed and, on December 1, 2004, filed suit against Turnberry in the Chancery Court for Williamson County alleging shoddy construction and numerous code violations. The Huberts sought damages under various causes of action, including fraudulent inducement,

breach of contract, violations of the Tennessee Consumer Protection Act, negligent misrepresentation, negligence, and mistake.

On January 25, 2005, Turnberry filed a motion to compel arbitration and to stay the litigation pursuant to the Federal Arbitration Act[1] and the arbitration clause contained in the construction agreement. The arbitration clause provides in relevant part as follows:

> BINDING ARBITRATION: By signing this Agreement, Seller and Purchaser agree that any claim or controversy between or among the parties whether based in contract, warranty, negligence, or other possible legal theories, shall be determined by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . .

Turnberry also filed an affidavit of its president identifying the interstate origins of various materials used in the construction of the house.

The Huberts opposed Turnberry's motion to compel arbitration based on the construction contract's choice of law clause[2] and on the Tennessee Uniform Arbitration Act.[3] Because the contract provided that the parties' rights and obligations would be governed by Tennessee law, the Huberts first argued that the arbitration clause was unenforceable because the TUAA expressly prohibits the enforcement of private agreements to arbitrate in residential construction contracts unless the arbitration clause is separately signed or initialed by the parties[4] and because they had neither signed nor initialed the agreement to arbitrate. Second, relying on *Frizzell Constr. Co. v. Gatlinburg*, L.L.C., 9 S.W.3d 79 (Tenn. 1999), the Huberts argued that notwithstanding the arbitration clause, they were entitled to a judicial resolution of their fraudulent inducement claim. Responding to the Huberts, Turnberry insisted that the parties' agreement to arbitrate was governed by the FAA and was, therefore, fully enforceable.

The trial court evidently accepted the Huberts' broader argument. On March 18, 2005, the court entered a three-line order denying Turnberry's motion to compel arbitration and to stay the litigation. The court offered no explanation for its ruling. Turnberry appealed.

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[1] 9 U.S.C.A. §§ 1-16 (West 1999 & Supp. 2006) ("FAA").

[2] The contract's choice of law clause provides:

> CHOICE OF LAW AND VENUE: All rights and obligations between the parties arising out of or relating to the Property and this Agreement shall be governed by the laws of the state of Tennessee. The venue for any arbitration shall be in the county where the Property is located.

[3] Tenn. Code Ann. §§ 29-5-301 to -320 (2000) ("TUAA").

[4] Tenn. Code Ann. § 29-5-302(a).

II.

This court reviews a grant or denial of a motion to compel arbitration under the FAA or the TUAA under the same standards that apply to bench trials. *Spann v. Am. Express Travel Related Servs. Co.*, No. M2004-02786-COA-R3-CV, 2006 WL 2516431, at *5 (Tenn. Ct. App. Aug. 30, 2006). The standards this court uses to review the results of bench trials are well-settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Reviewing findings of fact under Tenn. R. App. P. 13(d) requires an appellate court to weigh the evidence to determine in which party's favor the weight of the aggregated evidence falls. There is a "reasonable probability" that a proposition is true when there is more evidence in its favor than there is against it. *Chapman v. McAdams*, 69 Tenn. (1 Lea) 500, 506 (1878); *see also* 2 MCCORMICK ON EVIDENCE § 339, at 484 (Kenneth S. Broun ed., 6th ed. 2006) (defining "proof by a preponderance" as "proof which leads the [finder of fact] to find that the existence of a contested fact is more probable than its nonexistence"). Thus, the prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Parks Props. v. Maury County*, 70 S.W.3d 735, 741 (Tenn. Ct. App. 2001); *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999).

Tenn. R. App. P. 13(d)'s presumption of correctness requires appellate courts to defer to a trial court's findings of fact. *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). Because of the presumption, an appellate court is bound to leave a trial court's finding of fact undisturbed unless it determines that the aggregate weight of the evidence demonstrates that a finding of fact other than the one found by the trial court is more probably true. *Parks Props. v. Maury County*, 70 S.W.3d at 742. Thus, for the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000). The trial court's conclusion that the arbitration clause in the parties' construction contract was unenforceable is a question of law that we will review de novo without a presumption of correctness.

III.

We turn first to Turnberry's claim that the FAA preempts the TUAA's requirement that arbitration clauses in contracts relating to residential structures must be separately signed or initialed by the parties in order to be enforceable. Turnberry argues that the states may not enact statutory requirements for arbitration agreements that are not applicable to contracts generally. We agree.

In 1925, Congress declared a nationwide policy favoring the enforcement of private agreements to arbitrate by enacting the FAA.[5] The FAA was designed to reverse centuries of Anglo-American judicial opposition to the enforcement of arbitration agreements. The heart of the statute, Section 2, mandates that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration" present or future controversies "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2.

Other sections of the FAA define relevant terms, 9 U.S.C.A. § 1, authorize federal courts to stay litigation pending the outcome of an arbitration proceeding, 9 U.S.C.A. §§ 3-4, provide procedures both for invoking the right to compel arbitration in federal court and for conducting arbitrations where the details are not otherwise specified in the parties' agreement, 9 U.S.C.A. §§ 5-8, and delineate the grounds and procedures for asking a federal court to confirm, set aside, or modify an arbitrator's decision, 9 U.S.C.A. §§ 9-13. Finally, the statute stipulates that it does not apply to contracts made prior to January 1, 1926, provides that the "Act of State doctrine" does not apply to proceedings under the Act, and establishes procedures for interlocutory appeal of federal court orders entered under the FAA. 9 U.S.C. §§ 14-16.

The FAA is expressly limited to disputes arising out of maritime transactions or contracts involving interstate commerce. Moreover, for many years, it was unclear whether the FAA contained a substantive rule of arbitrability applicable in state and federal courts alike or instead merely prescribed alternative dispute resolution procedures for the federal courts. Thus, in 1955, the National Conference of Commissioners on Uniform State Laws[6] promulgated the Uniform

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[5]United States Arbitration Act, Pub. L. No. 68-401, §§ 1-15, 43 Stat. 883, 883-86. Congress later reenacted and codified the FAA. Act of July 30, 1947, Pub. L. No. 80-282, § 1, 61 Stat. 669, 669-74.

[6] At the centennial celebration of the National Conference of Commissioners on Uniform State Laws, the organization was described as follows:

> The Conference, as most lawyers know, is one of the two premier national organizations promoting law reform mainly in the sphere of private law, the other organization being the American Law Institute (ALI). Celebrating its 100th year, the Conference is the older of the two organizations, its founding having antedated the founding of the ALI by about three decades.
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> The Conference is a states-sponsored and -funded nonpolitical organization dedicated to promoting improvement and uniformity in state law. Its

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Arbitration Act for passage by state legislatures "to validate arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary." Unif. Arbitration Act (1956) Prefatory Note, 7 U.L.A. 95, 96 (2005), *amended by* Unif. Arbitration Act (2000), 7 U.L.A. 1 (2005) ("UAA"). The UAA, as amended in 1956, was subsequently adopted by thirty-five states, and another fourteen states adopted arbitration statutes modeled on the UAA. Unif. Arbitration Act (2000) Prefatory Note, 7 U.L.A. 1, 2 (2005).

The UAA followed the same general format as the FAA, including the following provision, analogous to Section 2 of the FAA, mandating the enforcement of arbitration agreements in state court:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].

UAA § 1, 7 U.L.A. at 100.

Tennessee's judicial system has not always looked with favor on private arbitration even though arbitration has existed in various forms since the Roman era. *Merrimack Mut. Fire Ins. Co. v. Batts*, 59 S.W.3d 142, 148 (Tenn. Ct. App. 2001). As late as thirty years ago, the Tennessee Supreme Court held that "ordinarily provisions in private contracts for the arbitration of future disputes are not enforceable." *Cavalier Ins. Corp. v. Osment*, 538 S.W.2d 399, 403 (Tenn. 1976). However, six years later, the court reversed course and aligned itself with the majority of other state supreme courts holding that Section 2 of the FAA mandating the enforcement of private agreements to arbitrate applies in state and federal courts alike. *Tenn. River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 857-58 (Tenn. 1982). Two years later, the United States Supreme Court followed

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> members, called Uniform Law Commissioners, are state-appointed. The Conference is, in fact, a confederation of state uniform law commissions. Each of the fifty states, the District of Columbia, and Puerto Rico follows its own procedures for appointment of commissioners, who serve without pay. The more than 300 commissioners are drawn mainly from the ranks of practicing lawyers, legislators, judges, and academics.

Symposium, *One Hundred Years of Uniform State Laws Tribute*, 89 MICH. L. REV. 2073, 2079 (1991). Tennessee joined the National Conference of Commissioners on Uniform State Laws in 1909. Act of Feb. 9, 1909, ch. 86, §§ 1-5, 1909 Tenn. Pub. Acts 251, 252-52 (codified as amended at Tenn. Code Ann. § 4-9-101 (2005)); *see also* WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 162 (1991).

suit, holding that Section 2 of the FAA "creates federal substantive law requiring the parties to honor arbitration agreements" that must be enforced by both state and federal courts under the Supremacy Clause. *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9, 104 S. Ct. 852, 861 n.9 (1984).

In 1983, the Tennessee General Assembly enacted the TUAA to provide procedures for the enforcement of arbitration agreements in state court.[7] However, like the legislatures of several other states, the General Assembly imposed a heightened notice requirement for the enforcement of agreements to arbitrate contained in certain types of contracts. Accordingly, the enforcement provision of the TUAA provides as follows:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract; *provided, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.*

Tenn. Code Ann. § 29-5-302(a) (emphasis added).

As a result of the courts' conclusion that the FAA creates a federal substantive rule of arbitrability and the states' near-universal adoption of the UAA, there is substantial overlap between the enforcement provisions of the federal and state arbitration acts whenever a motion to compel arbitration is filed in state court and the transaction or contract at issue involves interstate commerce. If the state has adopted the UAA's enforcement provision without modification, there is no conflict between the FAA and the state's arbitration act. However, where, as in Tennessee, the state legislature has placed additional restrictions on the enforcement of arbitration agreements that are not present in the FAA or the UAA, cases will arise in which a state court will be required to enforce an agreement to arbitrate under the terms of the FAA but be prohibited from doing so under the state arbitration statute.

The United States Supreme Court directly addressed this conundrum in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652 (1996), a case cited by neither side in their briefs on appeal. In 1996, ten states imposed heightened notice requirements for the enforcement of agreements to arbitrate contained in at least some types of contracts. The statutes varied in their particulars. Some states required arbitration clauses to appear in a particular font or to be underlined in all capital letters.[8] Others required that the arbitration clause appear on the first page of the

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[7] Act of May 11, 1983, ch. 462, 1983 Tenn. Pub. Acts 946 (codified at Tenn. Code Ann. §§ 29-5-301 to -320).

[8] Mo. Ann. Stat. § 435.460 (Vernon 1992); Mont. Code Ann. § 27-5-114(4) (1995); S.C. Code Ann. § 15-48-10(a) (Law. Co-op. Supp. 1995).

contract or immediately above the parties' signatures.[9] Still others, including Tennessee, required that the arbitration clause be separately signed or initialed by the parties or their attorneys in order to be enforceable.[10] One state even required the parties to execute a separate writing acknowledging the agreement to arbitrate.[11]

Doctor's Assocs., Inc. v. Casarotto involved a state court challenge to the heightened notice requirement contained in Montana's version of the UAA. As in the present appeal, the agreement to arbitrate appeared in a contract affecting interstate commerce and thus fell within the ambit of Section 2 of the FAA. Moreover, it was undisputed that Montana law supplied the substantive law governing the contract, including the Montana UAA. The typeface of the arbitration clause complied with the requirements of the Montana UAA in that it was underlined and in all capital letters. However, the arbitration clause did not comply with the Montana UAA's placement requirement. The disputed arbitration clause appeared on page nine of the contract, while Mont. Code Ann. § 27-5-114(4) required it to appear on page one.

The Court reiterated its observation in *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9 (1987), that "the text of § 2 declares that state law may be applied *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," and stated that generally applicable contract defenses such as fraud, duress, and unconscionability may therefore be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 686-87, 116 S. Ct. at 1656 (internal quotation marks omitted).[12] The Court then noted that, by the same token, "[c]ourts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, 116 S. Ct. at 1656 (citing *Perry v. Thomas* and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843 (1995)).[13] In other words, by

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[9]Cal. Bus. & Prof. Code § 7191 (West 1995); R.I. Gen. Laws § 10-3-2 (Supp.1995).

[10]Ga. Code Ann. § 9-9-2(c)(8), (9) (Michie Supp. 1995); Tenn. Code Ann. § 29-5-302(a) (Supp. 1995); Tex. Civ. Prac. & Rem. Code Ann. § 171.001(b), (c) (West Supp. 1996); Vt. Stat. Ann. tit. 12, § 5652(b) (Supp. 1995).

[11]Iowa Code Ann. § 679A.1(2)(c) (West 1987).

[12]See also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 685, 116 S. Ct. at 1655 (quoting *Perry v. Thomas*, 482 U.S. at 492 n.9, 107 S. Ct. at 2527 n.9) ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2].") (alterations in original).

[13]As the Court had previously explained:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its

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enacting Section 2 of the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, 116 S. Ct. at 1656 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 2453 (1974)).

The Court concluded that Montana's statute directly conflicted with the FAA because "the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, 116 S. Ct. at 1656. The Court cited with approval academic commentary stating that under *Southland Corp. v. Keating* and *Perry v. Thomas*, "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, 116 S. Ct. at 1656 (quoting 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 19.1.1, at 19:4-19:5 (1995)).

The Court also determined that the Montana Supreme Court has misread *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S. Ct. 1248 (1989) in upholding Montana's heightened notice requirement. The Court described *Volt* as involving "an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the resolution of a related judicial proceeding." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688, 116 S. Ct. at 1656. The Court observed that its holding in *Volt* that the state procedural rule was not preempted by the FAA rested on the fact that the state rule "determined only the efficient order of proceedings" and "did not affect the enforceability of the arbitration agreement itself," while application of Montana's heightened notice requirement "would invalidate the [arbitration] clause." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688, 116 S. Ct. at 1656-57. The Court then held that "[t]he goals and policies of the FAA . . . are antithetical to threshold limitations placed specifically and solely on arbitration provisions" and that Section 2 of the FAA therefore preempted Montana's heightened notice requirement. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688, 116 S. Ct. at 1657.[14]

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> arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent.

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 281, 115 S. Ct. at 843.

[14]State laws occasionally require that certain contractual provisions, e.g., clauses relating to punitive damages or gross negligence, be displayed prominently in a contract or be underlined or in bold or all capital letters. The parties in *Doctor's Assocs., Inc. v. Casarotto* raised this point both in their briefs and at oral argument. Thus, in its decision in *Doctor's Assocs., Inc. v. Casarotto*, the Court implicitly rejected the argument that arbitration clauses may be subjected to heightened notice requirements under state law without contravening the FAA as long as some unspecified number of other contractual provisions are subject to the same requirement. Rather, the decision stands for the proposition that Section 2 of the FAA preempts threshold limitations on the enforcement of written agreements to arbitrate unless the same limitation would apply to invalidate "*any* contract" or contractual provision. 9 U.S.C.A. § 2 (emphasis added).

Several of the heightened notice provisions on the books when the Court decided *Doctor's Assocs., Inc. v. Casarotto* have subsequently been held to be preempted by the FAA.[15] Moreover, we see no colorable argument for distinguishing the typeface and placement requirements of the Montana UAA from the separate signature or initialing requirement of Tenn. Code Ann. § 29-5-302(a). The obvious purpose of both statutes is to ensure that parties to a written contract understand full well that by entering into the contract, they are agreeing to resolve future disputes by arbitration and are waiving their right to pursue claims in state or federal court. Accordingly, Section 2 of the FAA preempts Tenn. Code Ann. § 29-5-302(a) in cases involving written agreements to arbitrate disputes arising out of maritime transactions or contracts affecting interstate commerce. Because the purchase agreement is a contract affecting interstate commerce, the trial court erred in denying Turnberry's motion to compel arbitration in its entirety.

IV.

One other issue remains despite our decision that the FAA preempts the heightened notice requirement in Tenn. Code Ann. § 29-5-302(a). The Huberts contend that even if the trial court erred by denying Turnberry's motion to compel arbitration outright, it nevertheless correctly refused to submit their fraudulent inducement claim to the arbitrator. We agree.

The Tennessee Supreme Court confronted this precise issue in *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999). There, the parties entered into a contract to build a hotel in Sevier County, Tennessee. The contract contained an arbitration clause, as well as a choice of law provision stating that Tennessee law would govern all disputes arising out of the contract. When a dispute arose regarding the payments due under the contract, the developer filed suit against the purchaser for breach of contract and to enforce a mechanic's lien in the Chancery Court for Sevier County. The purchaser filed a counterclaim alleging, among other things, that the developer had fraudulently induced it to sign the construction contract. The developer filed a motion to compel arbitration and to stay the litigation. The trial court granted the motion to stay the litigation and submitted the issues regarding the overdue payments to arbitration. However, the court withheld from arbitration the purchaser's claim of fraudulent inducement. The developer appealed.

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[15] *See, e.g., Kagan v. Master Home Prods. Ltd.*, 193 S.W.3d 401, 407 (Mo. Ct. App. 2006); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 203 (Mo. Ct. App. 1996); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 476 S.E.2d 149, 152-53 (S.C. 1996); *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 721 (Tex. App. 1997); *see also David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2nd Cir. 1991) (holding prior to the decision in *Doctor's Assocs., Inc. v. Casarotto* that FAA preempted Vermont's heightened notice statute in cases involving interstate commerce); *Thompson v. Terminix Int'l Co.*, No. M2005-02708-COA-R3-CV, 2006 WL 2380598, at *6 (Tenn. Ct. App. Aug. 16, 2006) (declining to address whether FAA preempts heightened notice requirement of Tenn. Code Ann. § 29-5-302(a)); THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 4:5, 4-13 (3rd ed. 2005) ("A state law may not require greater information or choice in the making of agreements to arbitrate than in other contracts; otherwise, such state laws or regulations are federally preempted assuming that the FAA controls the transaction at issue. . . . Many states have made failed efforts to legislate contractual notice requirements intended to place contract signers on notice that they are about to agree to arbitrations. Even where the parties have adopted a choice-of-law provision, arbitration will not be denied for lack of a notice required under state law."). *But see Woolls v. Superior Court*, 25 Cal. Rptr. 3d 426, 439 (Cal. Ct. App. 2005) (holding FAA did not preempt heightened notice requirements of Cal. Bus. & Prof. Code § 7191 in contract to renovate residence because contract did not involve interstate commerce).

The Tennessee Supreme Court first determined that the contract involved interstate commerce and was therefore subject to the FAA. The court then turned to whether the parties had agreed to submit the issue of fraudulent inducement to arbitration. The court noted that claims of fraud in the inducement of the contract as a whole are not subject to arbitration under the TUAA and that the parties had selected Tennessee substantive law to govern their agreement. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d at 84-85 & nn.10-12. Accordingly, the court held that the parties had not agreed to submit claims of fraudulent inducement to arbitration and that the trial court therefore properly withheld the issue of fraud in the inducement while submitting the remaining issues to arbitration. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d at 85-86.

Turnberry does not argue that *Frizzell Const. Co. v. Gatlinburg, L.L.C.* was wrongly decided, nor does it offer any persuasive argument to justify our refusal to follow it. Moreover, in *Frizzell Const. Co. v. Gatlinburg, L.L.C.*, the Tennessee Supreme Court specifically cited *Doctor's Assocs., Inc. v. Casarotto* in the course of its general discussion of arbitrability and the FAA. *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d at 84. Thus, while there is arguably some tension between the rulings in *Doctor's Assocs., Inc. v. Casarotto* and *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, we are not at liberty to reject the Tennessee Supreme Court's later decision, particularly when the court specifically cited in its opinion the prior decision by the United States Supreme Court on which the argument for declining to follow the Tennessee Supreme Court's decision would necessarily rest. Accordingly, on the authority of *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, we conclude that the trial court did not err in denying Turnberry's motion to compel arbitration with respect to the Huberts' claim of fraudulent inducement.

V.

We reverse the March 18, 2005 order denying Turnberry's motion to compel arbitration with the exception of the portion of the order involving the Huberts' fraudulent inducement claim, which is affirmed. We remand this case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to Turnberry Homes, LLC and its surety and to Trevor Hubert and Violet Hubert for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.